

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLENN K. HILL)	
Claimant)	
VS.)	
)	Docket No. 230,639
CHEYENNE COUNTY)	
Respondent)	
AND)	
)	
EMC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the May 24, 1999 Order entered by Administrative Law Judge Pamela J. Fuller.

APPEARANCES

Jeffrey E. King of Salina, Kansas, appeared for the claimant. James M. McVay of Great Bend, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the following: the preliminary hearing transcript dated March 3, 1998; the preliminary hearing transcript dated November 19, 1998; the deposition transcript of Glenn K. Hill dated February 9, 1999; the preliminary hearing transcript dated March 18, 1999; and the transcript dated May 20, 1999, from a combined preliminary hearing and motion for penalties.

ISSUES

This is a claim for a series of accidents and micro-traumas occurring from 1993 through approximately May 21, 1997, and the resulting left hip injury. After conducting a hearing that addressed both claimant's request for preliminary hearing benefits and claimant's request for penalties, Judge Fuller ordered the respondent and its insurance carrier to reinstate temporary total disability benefits as of March 21, 1999, and provide claimant with additional medical treatment. The Judge denied the request for penalties. Later, the Judge changed the reinstatement date to March 31, 1999.

Claimant contends the Judge erred. He argues that temporary total disability benefits should have been reinstated as of February 19, 1999, when the respondent and its insurance carrier stopped paying them. Further, he argues that the Judge erred by denying the request for penalties for failing to pay previously ordered temporary total disability benefits.

Conversely, respondent and its insurance carrier contend that the Appeals Board does not have the jurisdiction to review, at this juncture of the proceeding, claimant's request for temporary total disability benefits for the period in question. Also, they contend that claimant had reached maximum medical improvement and, therefore, they were entitled to terminate the temporary total disability benefits according to the Judge's November 24, 1998 Order. Alleging they were entitled to terminate the temporary total disability benefits, they argue that claimant's request for penalties is without merit.

The only issues before the Board on this appeal are:

1. Is claimant entitled to receive temporary total disability benefits for the period from February 19, 1999, through March 21, 1999?
2. If so, is claimant entitled to receive penalties for the nonpayment of those benefits?

FINDINGS OF FACT

1. Glenn K. Hill injured his left hip working for Cheyenne County and underwent a total hip revision arthroplasty in April 1998. That surgery was not a success.
2. By Order dated March 3, 1998, Assistant Director David A. Shufelt found this claim compensable. The Appeals Board affirmed that Order on April 28, 1998.
3. By Order dated November 24, 1998, Judge Fuller reinstated a previous order of temporary total disability and medical benefits. That Order required Cheyenne County and its insurance carrier to pay Mr. Hill temporary total disability benefits commencing September 18, 1998. The Order read, in part:

That temporary total disability compensation is hereby granted and ordered paid by Respondent and Insurance Carrier, commencing from September 18, 1998 until further order or until certified as having reached maximum medical improvement; or released to regular job; or becomes re-employed, whichever comes first. . .

That Order was not appealed.

4. Mr. Hill's treating physician, Travis Heare, M.D., wrote the county's insurance carrier on December 16, 1998, and advised that Mr. Hill had not reached maximum medical recovery from his hip surgery. The doctor wrote:

In answer to your fax of 11-18-98, at this point I would consider Mr. Hill not at maximum medical improvement until one year postoperatively. Long term restrictions which are permanent would be no lifting greater than 45 pounds, no repetitive lifting greater than 25 pounds, and no prolonged standing or walking with work. He does have a permanent partial disability; however, I do not do disability ratings. I feel that Mr. Hill should never return to his previous occupation with the Cheyenne County Road and Bridge Department as the work is much to [sic] heavy for a person with a total hip replacement, especially after having undergone a revision. . . .

5. On February 10, 1999, orthopedic surgeon C. Reiff Brown, M.D., examined Mr. Hill at Cheyenne County and its insurance carrier's request. After receiving Dr. Brown's report that Mr. Hill had reached maximum medical recovery, the county and its insurance carrier terminated his temporary total disability benefits as of February 19, 1999.

6. Mr. Hill then filed a request for an order reinstating the benefits and for penalties, which was heard on May 20, 1999. By Order dated May 24, 1999, Judge Fuller reinstated the temporary total disability benefits as of March 21, 1999, but denied the request for penalties. On June 14, 1999, Judge Fuller entered an Amended Order for Compensation and modified the reinstatement date to March 31, 1999. It is these orders that are the subject of this appeal.

7. Shortly before the May 20, 1999 hearing, Mr. Hill experienced what Dr. Heare described as a catastrophic failure of his total hip arthroplasty. The March 21, 1999 reinstatement date coincides with the date of the catastrophic failure. The March 31, 1999 amended reinstatement date coincides with the date that Dr. Heare operated on the hip, revising the total hip arthroplasty for a second time.

CONCLUSIONS OF LAW

1. The May 24, 1999 and June 14, 1999 Orders denying the request for penalties should be affirmed. And the appeal challenging the date that temporary total disability benefits should be reinstated should be dismissed.

2. The orders reinstating temporary total disability and medical benefits are preliminary hearing orders. And the Board's jurisdiction to review preliminary hearing findings and orders is limited. The following issues are expressly subject to review from a preliminary hearing.¹

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

¹ K.S.A. 1999 Supp. 44-534a.

3. Did the worker provide timely notice and written claim?
4. Is there any defense that goes to the compensability of the claim?

Additionally, the Appeals Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction or authority.²

3. One of Mr. Hill's contentions is that he was temporarily and totally disabled when the county and its insurance carrier terminated temporary total disability benefits on February 19, 1999. Judge Fuller made an implicit finding that Mr. Hill was not as she denied the request for temporary total disability benefits for that period. At this juncture of the proceeding, that finding is not subject to review as the Board lacks the jurisdiction and authority to reweigh the evidence to determine if Mr. Hill was temporarily and totally disabled during the period in question.

4. Because Judge Fuller determined that Mr. Hill was not entitled to receive temporary total disability benefits for the period in question, at this point in time Cheyenne County and its insurance carrier should not be penalized for failing to pay benefits that have been determined not to be due.³

WHEREFORE, the Appeals Board affirms the May 24 and June 14, 1999 Orders denying claimant's request for penalties. And the Board dismisses the appeal challenging the date that temporary total disability benefits should be reinstated.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey E. King, Salina, KS
James M. McVay, Great Bend, KS

² K.S.A. 1999 Supp. 44-551.

³ See K.S.A. 44-512a.

GLENN K. HILL

5

DOCKET NO. 230,639

Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director